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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS S. KALMAR, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In this RICO case where plurality of predicate offenses was an element of the crime and where petitioner's activity could have been viewed under applicable units of prosecution law as either a single predicate offense or plural predicate offenses depending upon resolution of disputed facts, may the Court of Appeals, consistent with due process and petitioner's right to trial by jury, affirm on a factual theory not submitted to the jury and, at the same time, dismiss as harmless error the factual theory actually submitted by the trial court to the jury?

2. In this RICO case, was not Petitioner entitled, on his request, to a lesser included offense instruction under Federal Rule of Criminal Procedure 31(c) for predicate offenses as to which he satisfied the *Sansone* test?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

LOUIS S. KALMAR, SR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

Petitioner Louis S. Kalmar, Sr.* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed his judgment of conviction entered upon a jury verdict of guilt.

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* Pursuant to Rule 21.1(b), the appellants below were Eugene Boffa, Sr., Robert Boffa, Sr. and Chandler Lemon. Eugene Boffa, Sr. has heretofore filed a Petition For Writ Of Certiorari. Robert Boffa, Sr. and Chandler Lemon were granted new trials by the Court of Appeals.

PERTINENT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The following statutes set forth in the Appendix are pertinent:

18 U.S.C. section 1961, 1962, 1963, The Racketeer Influenced Corrupt Organization Act; 29 U.S.C. section 186, Taft-Hartley Act.

The following rule set forth in the Appendix is pertinent:

Rule 31(c) of the Federal Rules of Criminal Procedure.

The following constitutional provisions set forth in the Appendix are pertinent:

The fifth Amendment to the United States Constitution and the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Procedural History: Petitioner was convicted by a jury of RICO conspiracy (Count I) and a RICO substantive charge (Count II). Both convictions, as to this petitioner, were predicated on his commission of four misdemeanors during the four month period, July-October, 1975 within the 11 year time span, 1969 through 1980, charged in the RICO counts. Concurrent 10 year prison sentences, an aggregate fine of $20,000 and forfeiture of property valued over $250,000, were imposed as sentence. The Court of Appeals for the Third Circuit affirmed the judgment of conviction (convictions and sentences) but vacated judgment of forfeiture for further consideration by the trial court.

Concise Statement of Facts: Petitioner had been one of the principals in Universal Co-ordinators, Inc. ("UCI") a labor leasing company, since 1960 and, as here pertinent, during the entire 11 years charged in the RICO counts. The indictment alleged generally that during this 11 year period, the charged defendants, with the exception of a charged labor official, were all associated with UCI or related companies and had engaged in multiple mail fraud schemes, multiple bribery schemes and obstruction of justice.

Petitioner, however, was charged with culpable participation in only one of the many criminal episodes over the 11 years, i.e. a scheme to provide the use of a car, free of cost, to the union official in violation of the misdemeanor provisions of the Taft-Hartley Act (Kalmar was originally also charged with participation in a separate scheme to sell the same car to the official at below market price, but this charge was withdrawn by the prosecution before verdict). Petitioner's conviction is premised on his having caused UCI to furnish this automobile, a 1975 Lincoln Continental, to the union official for the latter's free use during the period July-October, 1975. The government's theory of how multiple units of prosecution might be extracted from the referenced scheme, which was espoused by the trial court in its instructions to the jury, was found by the Court of Appeals to have been "harmless error" (App. 35a) and the Court of Appeals opted for a different theory for extracting multiple units of prosecution based on inferences and conclusions that the jury could have drawn from the evidence but, it is submitted, the jury never considered because the appellate affirmance theory was not submitted to it.

Among the corporations affiliated with UCI and controlled by Petitioner and his co-Petitioner, Eugene Boffa, Sr., was an automobile leasing company called

All Purpose Leasing, Inc. ("APL"). The car was purchased specifically for Sheeran by Boffa using UCI funds but titled in APL and thereafter delivered to Sheeran for his free use, including the period July-October, 1975. It was mutually understood that Sheeran's use of the car would be free, continuous and uninterrupted during the entire time frame, as in fact it was. Unknown to Sheeran (App. 33a), the two corporations controlled by Petitioners, UCI and APL, had monthly transactions regarding the car i.e. an APL monthly lease invoice to UCI was paid each month by UCI and one document offered in evidence showed that, as between UCI and APL, UCI was the lessee of the car and APL the lessor. Later in 1975, a grand jury subpoena was served for the books and records of APL. Pursuant to the obstruction of justice charges in the indictment (Petitioner was not charged with such activity), the books and records of APL were falsified to make it appear that Sheeran had been leasing and paying for use of the car during the relevant time period, including the insertion of his name in various documents as lessee of the car. Documents showing Sheeran as the lessee were turned over to the grand jury and formed the basis for the obstruction of justice charge.

The indictment charged that for the period July-October, 1975, four separate Taft-Hartley violations had occured on the theory that Petitioners caused "UCI to deliver the free use for a month [naming July, August, September and October in separate counts] of a 1975 Lincoln Continental . . . to Francis Sheeran by paying the monthly lease payment for this vehicle to APL . . ." (App. 30a)

Following the government's consistent, repeated—and on this record, untenable—position in the lower court, the trial court responded to Petitioner's argument that a single gift of four months free use of the car had

been made by instructing the jury that the jury could find that each of UCI's monthly payments constituted a separate delivery to Sheeran of a free month's use if the jury found beyond a reasonable doubt "that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the automobile". (App. 35a)

In the Court of Appeals, Petitioner complained that the "discharge of monthly rental obligation" theory was simply unsupported by the record since Sheeran never had any such obligation, having received a gift of the use of the car which was a single violation of the Act.

The Court of Appeals found that the district court's jury instructions on this point (and the government's trial position) was "harmless error" and affirmed on a theory that neither party had briefed; which had never been articulated by the government; and which was never charged to the jury i.e. that UCI was the lessee of the car and its payments to APL were to acquire UCI's own interest in the car—on a month to month basis—which were constructively delivered to Sheeran on a monthly basis by permitting him free use of the car for the four month period.

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals' affirmance of this criminal conviction on the basis of a theory not presented to the jury as to the pivotal point of whether the facts as presented made out multiple Taft-Hartley violations violates due process of law and Petitioner's right to trial by jury and is so at odds with established precedent of this Court that the grant of certiorari is warranted under the standard set forth in Rule 17.1.(a) that certiorari will be granted where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(2) In deciding that it was the intention of Congress that a predicate offense in a substantive RICO charge not be deemed a lesser included offense for purposes of requested jury instructions under Federal Rule of Criminal Procedure 31(c), notwithstanding that the predicate-RICO relationship in this case facially satisfied the *Sansone* lesser included offense instruction test, the Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

ARGUMENT

Point I

Petitioner was denied due process of law and right to trial by jury by the Court of Appeals' affirmance of his conviction on a basis not presented to the jury.

It is fundamental that theories of conviction cannot be changed on appeal and a defendant is denied due process of law if his conviction is affirmed on appeal on a theory different from that tried. In *Dunn v. United States*, 442 U.S. 100, 106-107 (1979) this Court said:

> There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in Cole v. Arkansas, supra., at 201, 92 L.Ed. 644, 68 S.Ct. 514, "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Likewise, in *Chiarella v. United States*, 445 U.S. 222 (1980), the Government offered in the Supreme Court a new alternative theory to support a defendant's conviction:

> The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented

> to the jury . . . we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of §10(b). (445 U.S. at 236-37)

Mr. Justice Brennan's concurring opinion in *Chiarella* makes a similar point:

> . . . I concur in the judgment of the majority because I think it clear that the legal theory sketched by the Chief Justice is not the one presented to the jury . . . Ambiguous suggestions in the indictment and the prosecution's opening and closing remarks are no substitute for proper instructions. *And neither reference to the harmless error doctrine nor some post hoc theory of constructive stipulation can cure the defect.* The simple fact is that to affirm the conviction without an adequate instruction would be tantamount to directing a verdict of guilty, and that we plainly may not do. (445 U.S. at 239) (Emphasis added.)

Units of prosecution are a matter of statutory construction. *United States v. C.I.T. Corp.*, 344 U.S. 218 (1952). Manipulation of the units to achieve multiple offenses is prohibited. *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (barring multiple offenses by "the simple expedient of dividing a single crime into a series of temporal or spatial units"). Close questions are often presented in single offense, multiple means contexts. *United States v. Tanner*, 471 F.2d 128, 138 (7th Cir. 1972) ("line between multiple offenses and multiple means to accomplish a single continuing offense is . . . especially difficult to draw . . .")

The unit of prosecution under the Taft-Hartley Act, as here pertinent, is "deliver[y of] . . . thing of value". 29 U.S.C. §186(a). Each delivery constitutes a separate offense. *United States v. Alaimo*, 297 F.2d 604 (3d Cir.

1961), *cert. denied*, 369 U.S. 817 (1962). In this case, multiple deliveries were the key to multiple offenses. 29 U.S.C. §186(a). The deliveries to the union official must be distinguished from the deliveries between UCI and APL; the former violate the Act, the latter do only if they constitute some form of constructive delivery to the official.

RICO "pattern of racketeering activity" requires at least two acts of racketeering activity. 18 U.S.C. §1961. As here pertinent, a racketeering activity is "any act which is indictable under title 29, United States Code, section 186 . . .". 18 U.S.C. §1961.

The indictable Title 29 act pled here, and charged to the jury, was "deliver[y of.] . . . free use for a month . . . of a 1975 Lincoln Continental . . . to Francis Sheeran . . ." (App. 30a). This was said to have occurred in July; in August; in September; and in October, 1975. The means, Federal Rule of Criminal Procedure 7(c)(1), pled here [*not* the "act . . . indictable"] was "by paying the monthly lease payment for this vehicle to APL" (App. 30a). Thus, the "pattern of racketeering" was monthly delivery of free use of the car for four months; the means by which this was accomplished was through the monthly lease payments.

Since Sheeran's use of the car was free, continuous, uninterrupted and intended to have been that from the outset—a single gift of continuing use had been made—it would seem obvious that the connection between the monthly payments and Sheeran's use of the car would be essential to pyramiding this episode into four units of prosecution, particularly in RICO where plurality of predicates is an element of the crime.

What, then, was the connection between the monthly payments and Sheeran's free use? In the District Court the government consistently maintained that the payments served to discharge Sheeran's monthly rental

obligation for the car; in other words, UCI paid APL monthly to relieve Sheeran of his debt which, in turn, yielded free use, on a monthly basis, to Sheeran. The Government's theory was based on *Korhultz v. United States*, 269 F.2d 897 (10th Cir. 1959) (periodic discharges of union official's debt could be multiple deliveries of things of value to official). Petitioner responded to the *Korhultz* theory by reliance on *United States v. Lippi*, 193 F. Supp. 441, 442 (D. Del. 1961) (sham debt not subject to periodic discharge). The prosecutor argued the discharge of debt rationale on pretrial motions (A-426)*:

> . . . The defendants are charged with the free use of the automobile in question in Taft-Hartley violations. That is different from just providing a car to a union official. It charged the free use. That occurs when the car is used and when the debt is discharged, thus making it a violation each time that occurs.

In his opening speech to the jury he argued the same theory ("The cars were leased by defendant Frank Sheeran and monthly payments were made on the lease agreement . . . and the monthly payments on those leases were not made by defendant Frank Sheeran but they were made by Universal Coordinators . . .") (Trans. A-31/32); on Rule 29(a) argument the prosecutor argued the same point ("Sheeran got the free use of the car each month through a particular means and that to have Universal Coordinators discharge the debt . . . the free part of that charge occurred when Universal Coordinators discharged the debt . . . there are separate offenses when the use became free on each occasion charged in the indictment . . ."). (A-520/521)

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*"A" citations are to the Court of Appeals Appendix, which co-Petitioner Boffa certified for transmission to this Court: Rule 19.2.

After this repeated argument from the Government as to its theory of the case, and in particular that multiple offenses came from the periodic discharge of Sheeran's debt on his lease, the trial court instructed the jury:

> If you find beyond a reasonable doubt *that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the car*, you may find that each payment constituted a separate delivery of a thing of value (A-317) (emphasis added.)

The Court of Appeals affirmed on a theory never tried to the jury and found that the facts necessary for this newly created theory had been resolved against Petitioner.

After reciting Petitioner's position that the monthly payments were a sham to conceal the single gift of four months (and not constructive deliveries of free months of use) the Court of Appeals states:

> The Government's position is that UCI acquired its interest in the automobile only by virtue of its monthly lease payments to APL. With each lease payment, UCI acquired one month's use of the car, and it was this "thing of value," the Government contends, that it gave to Sheeran on four separate occasions. It is not our role to resolve disputed questions of fact on appeal . . . the jury could have concluded that UCI was treated by APL in the same manner as any other lessor would have been and that had UCI stopped monthly payments on the car, Sheeran's use of the car would have been terminated. (App. 33a)

But this position was never articulated in the trial court and never articulated on appeal. Moreover, the

Court's observations about not resolving "disputed questions of fact on appeal" and conclusions that the jury could have drawn, presuppose some kind of instruction on this issue. There were no instructions, save the trial court's instruction on the government's trial theory—"discharge of debt."

As to the trial court's instruction on discharge of debt, the Court of Appeals finds Petitioner's interpretation that it required the jury to conclude that Sheeran had an actual lease obligation to APL to be an "overly literal" interpretation and, even if correct, "we would regard it as harmless error" (App. 35a).

Returning to *Dunn, supra*:

> There is to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal.

It is submitted that the instant case does indeed present a glaring distinction. The case was tried on theory that UCI discharged Sheeran's debt; that theory was briefed by Petitioner; the case was affirmed on the theory that UCI acquired its own interest in the car through the payments. These theories involved different operative facts. The affirmance theory was never tried to the jury. Certiorari should be granted and the case remanded to the Court of Appeals for consideration of Petitioner's appeal in light of the actual theory submitted to the jury.

Point II

The Taft-Hartley predicates were lesser included offenses for purposes of Federal Rule of Criminal Procedure 31(c), as to which Petitioner's requested instruction should have been granted.

Count II charged a RICO substantive violation. The predicates were the referenced Taft-Hartley

monthly free use offenses. Petitioner sought a lesser included offense instruction as to predicates which were within the statute of limitations on the authority of *Sansone v. United States*, 380 U.S. 343 (1965):

> The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31(c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.'

The District Court refused a lesser included offense instruction which was affirmed by the Court of Appeals. (App. 38a)

The Court of Appeals reasoned that the Circuit Courts have consistently held that Congress intended that multiple convictions and punishments should be permitted for RICO and its predicates *e.g. United States v. Rone*, 598 F.2d 564, 571 (9th Cir.), *cert. denied*, 445 U.S. 946 (1980). The Court noted that RICO and its predicates meet the facial requirements of the *Sansone* test but concluded:

> [A] lesser included offense instruction would be inconsistent with Congress's intention to permit multiple convictions and consecutive punishment for RICO and predicate crimes . . . We believe that such an instruction is inconsistent with Congressional intent and hold that the district court properly rejected it. (App. 39a)

In compound crimes, like RICO and Continuing Criminal Enterprise, 21 U.S.C. §848, the issue of whether Congress intended cumulative punishments, does not necessarily dispose of other policies dealing with lesser included offense instructions including giving the jury the option of acquitting on the greater charge but convicting on the lesser. In *Jeffers v. United States*, 432 U.S. 137 (1977), the Court did not appear to regard it as dispositive on the question of cumulative sentencing for violations of 21 U.S.C. §846 and §848 that §846 might be a lesser included offense to §848; instead, in the context of a compound crime, the Court appeared to view these as separate concepts. Mr. Justice Blackmun's assumption that §846 might be a lesser offense, for F.R. Crim. P. 31(c) purposes, did not seem to also dispose of the cumulative sentencing issue:

> If the two charges had been tried in one proceeding, it appears that petitioner would have been entitled to a lesser included offense instruction. See Federal Rule of Criminal Procedure 31(c); *Keeble vs. United States*, 412 U.S. 205, cf. *Sansone vs. United States*, 380 U.S. 343 . . . if such an instruction had been denied on the ground of §846 was not a lesser included offense of §848, petitioner could have preserved his point by proper objection. (432 U.S. at 153-54).

Mr. Justice Blackmun then turned to the "critical inquiry" in this particular case *i.e.* whether Congress intended to punish each statutory violation separately (432 U.S. 155). See also *Whalen v. United States*, 445 U.S. 664 (1980).

Petitioner submits that *Sansone* is the proper test in RICO cases and the predicates here charged met the *Sansone* test.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

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